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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-341

KENNY C. GUINN, Superintendent of Schools, Clark County School District, *et al.*,

Petitioners,

vs.

HERBERT E. KELLY, SR., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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HERBERT E. KELLY, SR., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion and the order denying a rehearing in banc of the United States Court of Appeals for the Ninth Circuit entered in this matter on February 22, 1972, with the petition for rehearing in banc denied on April 3, 1972.

Opinions Below.

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unreported at this writing and is printed in Appendix B to this petition.

The Order denying the rehearing in banc is printed in Appendix A to this petition.

The opinions of the District Court for the District of Nevada are printed in the Appendix as follows:

(1) June 23, 1969 Order (Appendix, pp. 22-23)

(2) December 3, 1970 Judgment and Decree (Appendix, pp. 24-30)

(3) February 9, 1971 Amended Judgment and Decree (Appendix, pp. 31-32)

(4) August 13, 1971 Special Findings of Fact (Appendix, pp. 33-35)

Jurisdiction.

The judgment of the Ninth Circuit Court of Appeals was entered on February 22, 1972, and a petition for rehearing in banc was filed on March 6, 1972. An order denying the petition for rehearing, however, amending language in the opinion of February 22, 1972, was entered on April 3, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

Questions Presented.

I.

IN A SCHOOL DISTRICT WHICH HAS NEVER MAINTAINED A DUAL SYSTEM, DO THE ACTS OR OMISSIONS OF A SCHOOL BOARD IN CONTRUCTING NEW FACILITIES, CLOSING OLD FACILITIES, AND MAKING ZONE ATTENDANCE CHANGES TO ACCOMMODATE INCREASING SCHOOL POPULATION, COMBINED WITH A GROWTH AND CHANGE IN THE RACIAL COMPOSITION OF THE NEIGHBORHOOD TO PREDOMINANTLY BLACK, CONSTITUTE SEGREGATION BY STATE ACTION IN

VIOLATION OF THE FOURTEENTH AMENDMENT, EVEN THOUGH SUCH ACTS OF THE SCHOOL BOARD INDEPENDENTLY, COULD NOT HAVE CAUSED SUCH SCHOOLS TO BECOME RACIALLY IMBALANCED?

II.

IS A SCHOOL DISTRICT WHICH HAS NEVER MAINTAINED A DUAL SCHOOL SYSTEM AND HAS NEVER EXCLUDED ANY PUPIL OF A RACIAL MINORITY FROM ANY SCHOOL DIRECTLY OR INDIRECTLY ON ACCOUNT OF RACE AS A MATTER OF SUBSTANTIVE CONSTITUTIONAL RIGHTS REQUIRED TO ABANDON THE NEIGHBORHOOD ZONING CONCEPT OF SCHOOL ATTENDANCE AND ASSIGN STUDENTS IN ORDER TO GAIN A PARTICULAR DEGREE OF RACIAL MIXING IN THE SCHOOLS?

Constitutional and Statutory Provisions Involved.

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

This is a case involving the desegregation of six elementary schools in the Westside Negro neighborhood of Las Vegas, Clark County, Nevada.

Respondents filed a Complaint on May 13, 1968, alleging that Petitioners from the time of creation of the Clark County School District have pursued policies of segregating Negroes and continue to pursue this practice. The Complaint further alleged that it has been the practice of the Petitioners and still is to denominate areas by neighborhoods. The Complaint further alleged that this is a scheme and practice for segregating Negroes who by custom, habit and circumstances are relegated only to residence in certain districts in Clark County.

The Complaint further alleged the rules and regulations promulgated by the Petitioners obligate the great majority of the Negro children to attend segregated elementary schools in the area known as the Westside, which said schools are known by the style of C. V. T. Gilebrt, Matt Kelly, Highland (since renamed Kermit Booker), Jo Mackey, Kit Carson and Madison Schools. That the pupil attendance of the said schools is 98% or more of Negro children, who are compelled to attend the said schools by the fiat, edit and direction of the Petitions. That said pupils are deprived of the equal protection of the law because of the method of neighborhood assignment to schools by the Petitioners.

The remedy sought was to enjoin the School Board, their agents, servants and employees, and successors in office from assigning Negro children to Negro schools to which there are not an equal number of white or

other racially different students assigned. Other relief sought was that the School Board be directed to reassign by the start of 1968-1969 school year at least 50% of the Negro children now assigned to Negro schools to generally integrated facilities. The cause of action is based on the rights, privileges and immunities granted by the due process of law and equal protection provisions of Amendments 5 and 14 of the United States Constitution, and the laws made in pursuance thereof.

The case came to trial on October 14, 15, and 16, 1968 on the merits and at the conclusion of this hearing the Court directed the School Board to formulate and propose a plan to accomplish integration of the six Westside elementary schools in Clark County, and submit it to the Court on April 10, 1969. A voluntary integration plan designated "An Action Plan For Integration of the Six Westside Elementary Schools," was filed with the Court on April 10, 1969.

A hearing was held on the Plan on May 28 and 29, 1969, and after hearing testimony and arguments on the Plan and objections thereto and proposed alternative solutions by Respondents and Intervenors, the Court approved the Plan to commence at the opening of school in September of 1969. The Court entered an Order on June 23, 1969 (Appendix, pp. 22-23) approving the Plan and requiring the School Board, on or before March 1, 1970, to file with the Court a report of the accomplishments of the Plan toward effective integration of the six Westside elementary schools, together with any suggested modifications of the Plan.

The Report to the Court was filed on March 2, 1970 as required by the Order, and on August 17 and 19,

1970, the Court heard the presentation of the Report to the Court and suggested changes and alterations to the voluntary Action Plan for Integration of the Six Westside Elementary Schools which would be continued and put into effect at the beginning of the 1970-1971 school year. The Court also heard objections to the Report and the continuation of the plan with changes for the 1970-1971 school year.

Having received no word or order from the Court prior to the beginning of the 1970-1971 school year, the voluntary Action Plan for Integration of the Six Westside Elementary Schools was continued with the proposed changes. Subsequently, on December 2, 1970, the Court filed its Judgment and Decree (Appendix, pp. 24-30) ordering the School Board to adopt and effectuate an integration plan to be put into effect upon the commencement of the 1971-1972 school year, wherein the elementary schools of the Westside area shall be desegregated with the result that the black student enrollment in any grade level in any elementary school in the Clark County School District shall not exceed fifty percent of the total student enrollment in such grade.

The Court subsequently entered on February 9, 1971 an Amended Judgment and Decree (Appendix, pp. 31-32), clarifying some of the language, however, the fifty percent requirement was not amended, and the School Board filed a Notice of Appeal from the District Court Order.

Pursuant to the Amended Judgment and Decree, the School Board adopted a plan of integration whereby there would be no elementary school with more than fifty percent black enrollment in any one grade or class and designated the plan as the Sixth Grade

Center Plan, which plan includes the reassigning of students out of their previously designated neighborhood schools and provides transportation to the reassigned schools.

Respondents then filed a Motion to Stay the Implementation of the Sixth Grade Center Plan and requested an amendment to the Plan. Subsequent to the decision of the United States Supreme Court in *Swann et al. v. Board of Education*, 402 U.S. 1, the School Board filed a Motion to Reconsider Amended Judgment and Decree, requesting the Court to allow the School District to continue the voluntary Action Plan for Integration of the Six Westside Elementary Schools without the requirement of no more than fifty percent black in any elementary school, grade or class, on the basis that the School Board does not maintain a system of state-imposed segregation or have a past history of state-enforced discrimination of a racially separate school system.

On June 2 and 3, 1971 the Court heard all of the pending Motions and entered an Order on June 11, 1971, denying all pending motions except for the School Board's Motion for Stay on Appeal which was granted. Respondents then filed a Motion to Vacate Stay of the Amended Judgment and Decree with the Ninth Circuit Court of Appeals. After Special Findings of Fact (Appendix, pp. 33-35) were filed with the Ninth Circuit by the District Court, the Motion to Vacate the Stay Order was denied.

There was an appeal and cross-appeal to the United States Court of Appeals for the Ninth Circuit. The opinion of the Court of Appeals was issued on February 22, 1972, and, a petition for rehearing in banc

filed by the School Board was denied on April 3, 1972. The opinion affirmed on both appeals and in the Order denying the rehearing there was a change in some of the language of the opinion. On May 10, 1972, the District Court set aside its Stay Order and ordered the implementation of the Sixth Grade Plan commencing with the 1972-1973 school year.

This petition seeks review of the judgment of the Court of Appeals. References are to the opinions below printed in the Appendix.

The Clark County School District has never maintained separate educational facilities for different races or the state-enforced dual school systems involved in those cases which this Court has previously decided. The Clark County School District covers an 8,000 square mile area. The Greater Las Vegas attendance area which is involved in this action is approximately 330 square miles. Pupils in the Clark County school system are assigned to schools on the basis of their residence, and the availability of classroom space because of the rapidly increasing school population since 1956. School attendance areas are established for each school based upon a so-called neighborhood school policy in accordance with the growth of neighborhoods and the building of new facilities. The Court of Appeals recognized that there was no racial segregation by State action:

> "Not surprisingly, the record contains no express mandate or sanction by any state agency of racial segregation in Clark County elementary schools." (Appendix, p. 10)

The Judgment and Decree of the District Court also recognized this case as one involving "de facto" or neighborhood segregation: (Appendix, p. 24)

> "The neighborhood school concept must be abandoned to accomplish integration in a racially segregated residential area."
>
> "The problem in Clark County is unique and, from some points of view, less critical than in other urban areas where residential segregation, combined with the neighborhood school concept, has dictated segregated schools." Id. at p. 25.
>
> "We have alluded at the outset to cases now pending before the Supreme Court which, when decided, may throw considerable light upon the judicial responsibility in the field of de facto segregation." *Id.* at p. 27.

Here the District Court was referring to *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S. Ct. 1267 (1971). Subsequent to the decision by this Court in Swann the School Board filed a Motion to Reconsider the Amended Judgment and Decree based upon the Swann decision, however the District Court, after a hearing, denied the motion.

In the District Court's Special Findings of Fact (Appendix, pp. 33-35) prepared at the request of the Court of Appeals the trial judge stated:

> "2. The integration in Clark County is not critical. For years, the high schools and junior high schools have been fully integrated. The substantial segregation found to exist in elementary schools is the consequence of residential patterns aggravated by adherence to the neighborhood

> school concept in school construction and maintenance. There is strong local resistance to extensive bussing of elementary school children. The Courts of Appeals and the Supreme Court have not to this date spoken clearly and plainly with respect to a school district's responsibility concerning problems of de facto segregation."

The six elementary schools complained of in this action, C. V. T. Gilbert, Matt Kelly, Highland (now Kermit Booker), Jo Mackey, Kit Carson and Madison are all located in the black residential area known as the Westside. The Trial Court found that while the school district eliminated segregation for students above the sixth grade level by not building any junior or senior high schools in the Westside area, it, at the same time, aggravated the incidence of segregation at the elementary level by constructing two new elementary schools in the black residential area. The Court of Appeals held that between 1956 and 1966, four new elementary schools were constructed in the Westside. The findings previously cited here establish that attendance at these schools is determined by residence and the location of schools. There is no state law or regulation of the School Board, nor has there ever been any, requiring attendance in these schools based upon race.

The Court of Appeals even recognized this as previously stated and further held:

> "In 1954, when Brown v. Board of Education, 347 U. S. 483, was decided, there were only two schools in the Westside area. Both had racially mixed enrollments. After 1954 the black population of Westside increased rapidly and became increasingly black in racial composition." (Appendix, p. 6)

Later the Court of Appeals in denying the petition for a rehearing stated in its Order (Appendix A):

> "The first two sentences of the first paragraph of Section II of the opinion filed February 22, 1972, are modified to read as follows:
>
> 'In 1954, when *Brown v. Board of Education*, 347 U. S. 483, was decided, there were only three schools in the Westside area.
> ' All had racially mixed enrollments.' "

In addition to changing the racial composition of the population in the Westside to becoming increasingly black during this period and therefore the public schools located there, this increase in population caused overcrowding in those schools. This condition required school authorities to construct additional facilities, renovate old facilities, and to continually adjust attendance boundaries of schools in order to accommodate increased enrollment. Twenty new elementary facilities were constructed throughout the School District between 1964 and 1968, and forty-nine schools were either renovated or in the process of being renovated.

The trial court found and concluded from the evidence that segregation exists in the six elementary schools located in the Westside and that the School District aggravated the incidence of segregation at the elementary level by constructing two new elementary schools in the black residential area. The trial court also found that because the School District does not construct or maintain junior or senior high schools on

the Westside, but does construct and maintain elementary schools on the Westside, that this bifurcated neighborhood school policy is principally responsible for the aggravation of racial segregation in the elementary schools. The District Court further found that residential segregation, combined with the neighorhood school concept has dictated segregated schools. As authority for requiring the School Board to take affirmative action and effective steps to reverse the segregation trend in referring to the bifurcated neighborhood school policy the trial court stated:

> "This policy was implemented long after Brown v. Board of Education, 349 U. S. 294, had clearly abjured the employment of official power to further the maintenance of segregated schools." (Judgment and Decree, Appendix, p. 26)

Therefore, the trial court based its decision in ordering desegregation of the six neighborhood elementary schools on three grounds or incidents:

1. Residential segregation, combined with the neighborhood school concept.

2. The non-existence of junior and senior high schools in the Westside area, and

3. The construction of two new elementary schools in the Westside black residential area.

The trial court then applied this Court's decision in the *Brown* case to arrive at the conclusion that the School Board had a duty to reverse the trend of segregation. There was no finding that this was *de jure*

segregation based on an express law or mandate of the state or School Board requiring the separation of races in the elementary schools. The remedy required by the trial court is the requirement that no elementary school, grade or class exceed fifty percent (50%) black students. Thus a particular degree of racial mixing is required by the trial court in the Las Vegas attendance area.

The Court of Appeals went further in holding that four new schools were constructed after this Court's decision in the *Brown* case and that the trial court's opinion is a clear finding that the School Board furthered racial segregation by official conduct beyond the mere adoption and administration of a neutral neighborhood school policy. (Appendix, p. 10) The Court also found that the closing of two elementary schools on the fringe of the Westside was discriminatory action even though counsel stipulated that the schools were closed because of their physical condition. (Appendix, p. 7)

The Court of Appeals also found that the almost completely black composition of the teaching staffs of Westside schools when the complaint was filed, combined with the District's methods of placing teachers established a *prima facie* case of violation of substantive constitutional rights. (Appendix, p. 12) The Court of Appeals also stated:

"1. The existence of almost total segregation of the races in the elementary schools of racially mixed Clark

County School District is itself a relevant factor. As Chief Justice Burger said in *Swann v. Board of Education, supra,* 402 U. S. at 25-26: 'Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.' (Appendix, pp. 10-11)

Thus the Court of Appeals concluded in applying this Court's decision in *Swann v. Board of Education, supra,* 402 U.S. 1, that the School Board was guilty of violation of substantive constitutional rights under the Equal Protection Clause.

Since the start of the school year in 1969, the School District has been operating on a voluntary integration enrollment plan whereby children are allowed to select from certain schools, the one the student wishes to attend and free transportation is provided. In addition, two of the elementary schools on the Westside, C. V. T. Gilbert and Jo Mackey are operated as prestige schools.

REASONS FOR GRANTING THE WRIT.

The reasons this Writ should be granted are two-fold in nature and present two vitally important questions that need answering and guidance from this Court. They are as follows:

1. Other Courts of Appeals in similar fact situations to this one, have concluded that the segregation is *de facto* in nature and not evidence of racial segregating practices by those school boards and therefore, there has been no requirement of those school districts to affirmatively require racial integration in their public schools. Therefore, this Court, must interpret and decide for the guidance of all courts, the question as to whether the United States Constitution affirmatively requires racial integration in public schools or whether it merely prohibits segregation by official action and not private action in the public schools.

2. The companion reason for granting this Writ is that a determination is needed by this Court as to whether or not there is any legal constitutional distinction between "de facto" and "de jure" segregation, and what, if any, are the necessary factual considerations a lower court must consider to show an official intention to segregate by races. The lower federal courts are divided as to whether failure or refusal of school authorities to remedy so-called *de facto* segregation violates the federal constitutional rights of Negro children, and whether or not racially imbalanced schools impair equal educational opportunities.

These are important Constitutional questions which have not been decided by this Court in a factual situation such as this.

This Court, since *Brown v. Board of Education,* 347 U.S. 483 (1954), has taken and decided numerous cases involving dual school systems, however, has never taken and decided a case from the federal court system from a jurisdiction which has never maintained a dual school system. To add to the problem, this Court's decision in *Swann v. Board of Education, supra,* 402 U.S. 1, 91 S. Ct. 1267 has caused confusion among the lower federal courts as to the application of that decision in a so-called *de facto* neighborhood case.

This Court has denied certiorari in cases involving northern and western school districts up to this time except for *Keyes v. School District No. 1, Denver, Colorado,* 445 F. 2d 990, cert. gran. ..... U.S. ..... Docket #71-507, 40 L. W. 3329, wherein this Court agreed, on the petition of plaintiffs, to hear the issue of segregation involving the core black and Spanish schools of Denver.

The District Court, *313 F. Supp. 61 at 75 and 83* held a school board was not constitutionally required to integrate schools which have become segregated because of the impact of racial housing patterns and neighborhood population movement or the neighborhood school system. The Court of Appeals agreed as to this point and disagreed as to the trial court's finding that even though there is *de facto* segregation the school board must at a minimum insure that its schools offer an equal educational opportunity. This Court has now granted certiorari to review the Court of Appeals decision as applied to those "core" schools in Denver.

Cases in which this Court has denied certiorari from the northern and western federal districts are: *Taylor*

v. Board of Education of City School District of New Rochelle, 294 F. 2d 36 (2nd Cir. 1961), cert. den. 386 U.S. 940 (1961); *Deal v. Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966), cert. den. 389 U.S. 847 (1967); *Deal v. Cincinnati Board of Education,* 419 F. 2d 1387 (6th Cir. 1969), cert. den. .... U.S. ...., 29 L. Ed. 2d 128 (1971); *Bell v. School City of Gary, Indiana,* 324 F. 2d 209 (7th Cir. 1963), cert. den. 377 U.S. 924 (1964); *Downs v. Board of Education of Kansas City,* 336 F. 2d 988 (10th Cir. 1964), cert. den. 380 U.S. 914 (1965); *United States v. School District No. 151, Cook County, Illinois,* 404 F. 2d 1125 (7th Cir. 1968), cert. den. .... U.S. ...., 29 L. Ed. 2d 111 (1971); *Board of Education v. Dowell,* 375 F. 2d 158 (10th Cir.), cert. den. 387 U.S. 931; *Davis v. School District of City of Pontiac,* 443 F. 2d 573 (6th Cir. 1971); cert. den. .... U.S. .... (Oct. 26, 1971).

This Court has also recently in a summary decision affirmed a three-judge federal court decision upholding a New Jersey statute setting school district boundaries resulting in extreme racial imbalance caused by housing patterns within various school districts. *Spencer v. Kugler,* 326 F. Supp. 1235 (1971); affirmed January 18, 1972, 404 U.S. 1027.

When *Brown* was decided in 1954, and subsequently Swann decided in 1971, it was made quite clear to school boards that dual school systems imposed by law are unconstitutional.

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guar-

antees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*." *Swann v. Board of Education*, 402 U.S. 1, 91 S. Ct. 1267 at 1275.

Also in *Swann* this Court stated:

"This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. These cases present us with the problem of defining in more precise terms than heretofore the scope of the duty of school authorities and district courts in implementing *Brown I* and the mandate to eliminate dual systems and establish unitary systems at once." 91 S. Ct. at 1271.

No clear guidelines exist from this Court as to what the Constitution requires of boards of education which have never operated dual school systems, however, have racially imbalanced schools due to the consequence of residential patterns and adherence to the neighborhood school concept as found by the trial court in this case. Special Findings of Fact (Appendix, pp. 33-35), Judgment and Decree (Appendix pp. 24-30).

As stated by the Sixth Circuit in *Deal v. Cincinnati*, 369 F. 2d 55 (1967) at 60:

"In the present case, the only limit on individual choice in education imposed by state action is the use of the neighborhood school plan. Can it be said that this limitation shares the arbitrary, invidious characteristics of a racially restrictive system? We think not. In this situation, while a

particular child may be attending a school composed exclusively of Negro pupils, he and his parents know that he has the choice of attending a mixed school if they so desire, and they can move into the neighborhood district of such a school. This situation is far removed from *Brown,* where the Negro was condemned to separation, no matter what he as an individual might be or do. Here, if there are obstacles or restrictions imposed on the ability of a Negro to take advantage of all the choices offered by the school system, they stem from his individual economic plight, or result from private, not school prejudice.[4] (reference to footnote) We read *Brown* as prohibiting only enforced segregation."

Language contained in the subsequent *Deal v. Cincinnati,* 419 F. 2d 1387 (1969) case could just as easily been applied to this case by the Ninth Circuit; at page 1392:

"There were many areas, formerly predominately white, which were changed to predominately Negro by the movement of Negroes to the neighborhoods, and this was reflected in the increase in the number of Negro children attending the schools there."

At page 1393:

"Even in the absence of such a statute, it would seem prudent to locate the schools where they will be easily accessible and convenient to most of the children and without the necessity of bussing the children or their crossing dangerous thoroughfares. The Board should consider locations in areas that are being developed where large popu-

lation increases are anticipated, and locations in areas where the Board already owns property. We find no abuse of discretion in the location of the schools. Nor do we think that we should tell the Board where to locate schools in the future."

In fact the Ninth Circuit recognized that three of the six elementary schools originally had racially mixed enrollments, however, after 1954 the population of Westside increased rapidly and became increasingly black in racial composition. (Appendix, p. 6)

Why, then, did the Ninth Circuit impose a legal duty on the school board to do something about a neighborhood situation it did not create in those three schools? This Court must therefore set down the Constitutional guidelines for a school district which has never maintained a dual school system but is now caught up in the various decisions throughout the nation regarding neighborhood schools.

As stated by this Court in *Swann:*

"At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I.* The systems will then be 'unitary' in the sense required by our decisions in Green and Alexander.

"It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. "Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the sys-

> tem. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 91 S. Ct. 1267 (1971) at 1283 and 1284.

It would thus seem that once a state-imposed dual school system has been desegregated as required by *Brown* and *Swann*, it is to be treated in the same manner as a school system which has operated on the neighborhood concept theory. At that point both are unitary school systems as has been defined by this Court in *Swann*, 91 S. Ct. at 1275, and *Green v. County School Board*, 391 U.S. 430, 88 S. Ct. 1689 (1968). There is then no Constitutional duty to make periodic adjustments in the racial composition of student bodies in order to maintain a racial mixture in the schools where the racial composition of neighborhoods has shifted. To impose such an affirmative duty on school boards would be unconstitutional in that it would require governmental action based solely on race considerations in violation of the Fourteenth Amendment.

Therefore, the petitioner school district should be treated equally as school districts which have maintained state-imposed dual school systems. In several recent decisions involving state-imposed segregation, the Courts of Appeal have allowed plans that resulted in some all black schools with no future plans to correct or eliminate the situation. Such was the case in Houston where in *Ross v. Eckels*, 434 F. 2d 1140 (1970)

the Court of Appeals modified and approved an equidistant zoning plan which was a modified neighborhood school plan, which resulted in 15 all or virtually all-Negro elementary schools, and a majority to minority transfer plan. The Court did not require any specific future plan for these schools, and held that each school desegregation case must turn on its own facts.

In *Mannings v. Board of Pub. Instruction of Hillsborough Co.*, Fla. 427 F. 2d 874 (1970), the Court of Appeals approved a plan desegregating a state-imposed system so that there would be eight elementary schools with all Negro student bodies and held that the all Negro student body schools which will be left are the result of neighborhood patterns just as is the case with the numerous all-white student body schools.

In *Ellis v. Board of Public Instruction of Orange Co., Fla.*, 423 F. 2d 203 (1970), the Court of Appeals approved a plan which resulted in three all-Negro student body schools which will remain, if the neighborhood assignment system is properly invoked, as being a result of residential patterns. The Court left alone other schools which were virtually all black. This district also had the majority-to-minority transfer rule in effect which was approved by the Court.

These decisions certainly raise conflicts as to what the duties of school officials are in neighborhood school situations and what the remedies are that lower courts may impose in these situations. If Courts of Appeal may approve plans which allow some all black, or virtually all black, schools to remain in a district which has clearly violated the arbitrary, invidious state discrimination prevented by the Constitution, then why impose a greater duty on a school district which basi-

cally because of population shifts all black or predominately black schools result. In a like factual situation as the case at bar, a trial judge could just as easily conclude that the segregation was a result of the population shifts and growth and not the isolated unconnected acts of the school board. To this extent the courts below are given great powers and have arrived at opposite decisions without the needed guidance from this Court in this type of situation. This Court in *Swann,* when speaking of the remedy in a dual school system stated:

> "As with any equity case, the nature of the violation determines the scope of the remedy." 91 S. Ct. 1267 at 1276.

The petitioners have never maintained a dual school system and the neighborhood school policy was in effect long before there was any racial imbalance in the schools, and therefore, it was not utilized as a device to perpetuate racial segregation. This Court has repeatedly spoken in *Swann* of "past history of discrimination." It is submitted that in a school district which has never maintained a dual school system either by state law or local school board policy, and where the only limitation on attending school is that a student must attend the neighborhood school, and where there is no officially imposed segregation of the races in the community, that there is no past history of racial discrimination if racially imbalanced schools result because of the exercise of freedom of choice as to the neighborhood in which to reside. This is a question that this Court must decide for guidance to all school districts which have never had a past history of racial discrimination.

Equal Educational Opportunity

In *Brown v. Board of Education* (1954) 347 U.S. 483, the Supreme Court overruled the "separate but equal" doctrine of *Plessy v. Ferguson* (1896) 163 U.S. 537 in a case involving a *de jure* school system. As a matter of law this rule would apply in the case at bar if the Clark County School District had been operating a *de jure* segregated school system. However, it has never done so and so there should be evidence and a specific finding by the Court that the racial imbalance creates unequal educational opportunity before the Court can intervene and order an end to the racial imbalance. The trial court made no such finding as to the Clark County School District, nor did the Court of Appeals. There was also no finding by the courts below that the elementary schools in the black neighborhoods were inferior or that the resources in those schools were unequal to other schools in the district. Therefore, the application of the *Brown* decision of the lower Courts to this case was erroneous and should be reversed. This Court must provide guidelines as to whether neighborhood racial imbalance, absent a finding of unequal educational opportunity, is sufficient to support a holding of deliberate segregation.

Civil Rights Act of 1964

The district court held that the segregation found to exist in elementary schools is the consequence of residential patterns aggravated by adherence to the neighborhood school concept in school construction and maintenance. It referred to the situation as one involving *de facto* segregation. The Court's remedy was the reduction of the minority pupil population in each affected school to an enrollment not to exceed 50 per-

cent of the total school enrollment. This necessarily requires reassignment of pupils based on race alone and it is necessarily required, because of the geography and housing pattern of Las Vegas, that extensive busing be implemented to accomplish this reassignment.

Therefore, the trial court's remedy is contrary to the various circuit court holdings previously cited herein that *de facto* segregation or racial imbalance cannot be judicially changed. In adopting this remedy, the district court imposed its views of social and educational policy upon another branch of government which is a usurpation of the powers properly delegated by the people of Nevada to the defendant Clark County School Board. The order also violated Congressional policy as contained in Title IV of the Civil Rights Act of 1964, 42 U.S.C., Section 2000c. This Court in *Swann* recognized and stated on this question as follows:

> "The legislative history of Title IV indicates that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called 'de facto segregation', where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities." (401 U.S. 1, at 17, 18).

The Civil Rights Act of 1964, recently amended by the Education Amendments of 1972, Title VIII, Sec. 806, treats school desegregation in detail and ultimately concludes that *de facto* or voluntary segregation shall not be treated by the courts. The Act provides that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transpor-

tation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. (42 U.S.C., Section 2000c-6(a)(2).

This Court in Swann stated that any particular degree of racial imbalance or mixing is not a matter of substantive constitutional right. The only requirement of school authorities is that they maintain a unitary school system. It is submitted that the evidence and record when reviewed by this Court will substantiate that the Clark County School District is a unitary school system.

Since the district court was not remedying the *de jure* segregation such as that in Brown and Swann, its order was in violation of the clear Congressional policy of the Civil Rights Act of 1964.

Also, as stated previously, courts throughout the country are arriving at different conclusions as to what are and are not acts of discrimination practiced by school authorities and what evidence is sufficient to show discrimination. Recently, Congress in the Education Amendments of 1972, Title VIII, Sec. 805 stated that the rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

Therefore, this Court's guidance is needed by courts and state and school authorities as to their responsibilities under the law in assigning students to the public schools.

Conclusion.

It is respectfully requested that this Court accept certiorari in this matter so that it may set guidelines for the lower Courts to follow in a neighborhood school integration case, and particularly set guidelines as to the specific findings a lower court must make in determining whether there is a constitutional violation which requires a remedy and the extent of that remedy to be applied by the courts.

It is submitted that because of the importance of this national issue, it is now time to answer the question of pupil racial imbalance arising in areas where there has been no state-imposed segregation. Does the Constitution require a mixing of races in the schools? What is the role of the courts and the school authorities in a racially imbalanced school system caused by residential racial patterns accompanied by the school authorities' and parental desire to have children attend a school close to their homes for convenience, safety, emotional and economic reasons? These are the questions which require this Court's decision as the Court of last resort empowered to interpret the Constitution as the supreme law of this nation.

Respectfully submitted,

ROBERT L. PETRONI,
Attorney for Petitioners.

APPENDIX A.

Order of the United States Court of Appeals, Filed April 3, 1972.

United States Court of Appeals, for the Ninth Circuit.

Herbert E. Kelly, Sr., et al., Plaintiffs-Appellees, v. Kenneth Guinn, Superintendent of Schools, Clark County School District, et al., Defendants-Appellants. No. 71-2332, No. 71-2340, No. 71-2422.

Before: Browning and Kilkenny, Circuit Judges, and Jameson,* District Judge.

The first two sentences of the first paragraph of Section II of the opinion filed February 22, 1972, are modified to read as follows:

> "In 1954, when *Brown v. Board of Education,* 347 U.S. 483, was decided, there were only three schools in the Westside area. All had racially mixed enrollments."

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.
Dated: April 3, 1972

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*Honorable William J. Jameson, United States District Judge, District of Montana, sitting by designation.

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Herbert E. Kelly, Sr., et al., *Plaintiffs-Appellees*, vs. Kenneth Guinn, Superintendent of Schools, Clark County School District, et al., *Defendants-Appellants*. No. 71-2332, No. 71-2340, No. 71-2422.

[February 22, 1972].

Appeal from the United States District Court for the District of Nevada.

Before: Browning and Kilkenny, Circuit Judges, and Jameson,* District Judge.

BROWNING, Circuit Judge:

The district court held that elementary schools in the Clark County (Nevada) School District, which includes the City of Las Vegas, were racially segregated. The court ordered implementation of a so-called "Sixth Grade Center Plan" to desegregate the schools. Defendant school officials appeal, asserting that no constitutional violation was established. Plaintiffs cross-appeal, contending that the "Sixth Grade Center Plan" is inadequate, and that the district court erred in failing to award attorneys' fees and costs. We affirm on both appeals.

At the outset we emphasize that the individual defendants are sued only in their representative capacity as incumbent officials of the Clark County School

*Honorable William J. Jameson, Senior Judge, United States District Court for the District of Montana, sitting by designation.

District. The policies which we hold violative of the Constitution were initiated and implemented primarily by their predecessors. In the words of the district court:

> "The present members of the Board may not be personally responsible for the actions of their ancestors in office, but we are concerned with a school district and its policies and actions, and not with the particular people who may have been vested with control from time to time. Quite realistically, the present Board is saddled with the mistakes of its predecessors and is obligated to take effective steps to reverse the segregation trend, however drastic the cure may be."

The district court also stated that aspects of defendants' efforts to eliminate segregation "are useful and disclose an enlightened attitude . . . regarding the social problems inherent in segregated schools."

We agree with this appraisal.

I

Procedural History

This is a class action under 42 U.S.C. §§1981 and 1983 (1964), alleging violation of the Fifth and Fourteenth Amendments. It was filed May 13, 1968, on behalf of the named plaintiffs and other residents of Clark County. The Superintendent of Schools and the members of the Board of Trustees of the Clark County School District were made defendants. The complaint alleged that the policies and practices of the school district "obligate the great majority of the Negro children to attend segregated schools in the area [of Las Vegas] known as the West Side." Equitable relief was sought.

Trial was held October 14, 15, and 16, 1968. Upon completion of the testimony, the district court orally announced its conclusion that elementary schools in Las Vegas were racially segregated. The court instructed school officials to prepare and submit an integration plan.

On April 10, 1969, the school district submitted "An Action Plan for Integration of the Six Westside Elementary Schools," referred to as the "freedom of choice" plan. It permitted black students to transfer to predominately white schools elsewhere in the district, and permitted white students to transfer from these predominately white schools to a "prestige" school established within the Westside area. A variety of special programs and a low teacher-pupil ratio were offered to induce white students to transfer to the "prestige" school.

On June 23, 1969, the court entered an order approving the "freedom of choice" plan for the school year beginning September 1969. The order required school officials to file a progress report by March 1, 1970. The required report was filed. Plaintiffs filed a response, and a hearing regarding the effectiveness of the "freedom of choice" plan was held on August 17 and 19, 1970.

On December 2, 1970, the court entered its judgment and decree.[1] The court concluded that the "freedom of choice" plan had failed to integrate elementary schools in the Clark County School District, and would fail to do so in the future. The court ordered the school district to adopt and effectuate an integration plan

[1]The judgment was amended in minor respects on February 8, 1971. See note 12.

for the school year beginning September 1971 that would result in a black student enrollment of no more than 50 per cent in any grade level in any elementary school in the district.

The school district appealed from the December 2, 1970, judgment. Meanwhile, however, pursuant to the judgment, the school district prepared and submitted a "Sixth Grade Center Plan." Under this plan each Westside elementary school was to be clustered with a group of white elementary schools, with the Westside school serving as a sixth grade attendance center for the group.

A number of post-judgment motions were filed. The school district filed a motion for reconsideration of the judgment based upon the subsequent decision in *Swann v. Board of Education*, 402 U.S. 1 (1971), and sought a stay pending appeal. On their part, plaintiffs filed a motion to amend the "Sixth Grade Center Plan," and to stay its implementation. They also filed a motion for allowance of attorneys' fees and costs.

We remanded the case to the district court to permit it to consider these motions. On June 11, 1971, the district court granted the school district's motion to stay the December 2 judgment pending appeal, and denied the remaining motions.

The school district appealed the denial of their motion to reconsider the judgment. Plaintiffs cross-appealed from the denial of their motion to modify the "Sixth Grade Center Plan," and from the denial of their motion for attorneys' fees and costs.

Plaintiffs also appealed the granting of the school board's motion for stay pending appeal, and petitioned this court to vacate the stay. At our request the district

court entered special findings of fact relevant to this application. On August 18, 1971, we denied plaintiffs' application to vacate the district court's stay, and ordered the various appeals expedited.

II

Factual Background

In 1954, when *Brown v. Board of Education*, 347 U.S. 483, was decided, there were only two schools in the Westside area. Both had racially mixed enrollments. After 1954 the population of Westside increased rapidly and became increasingly black in racial composition.

In 1956, to avoid racial segregation in junior and senior high schools, the school district announced that no new junior and senior high schools would be built in Westside. Thereafter, Westside pupils were bused to junior and senior high schools outside the area. At these grade levels the Clark County school system was, and is, completely integrated.

In contrast, between 1956 and 1966, four new elementary schools were constructed in Westside and one of the two existing schools was extensively renovated to accommodate additional students. The first of the four new elementary schools opened the same year the school district decided to open no new secondary schools in the area to avoid racial segregation at those grade levels. When the complaint was filed in 1968, black student enrollment in each of the six Westside elementary schools exceeded 97 per cent.

During the same period, in 1965, the school district closed two predominately white schools on the fringe of Westside, between black and white neighborhoods.

If these schools had not been closed, their enrollment would now be about half white students and half black.[2] At about the same time, the school district built a new elementary school in a more distant white residential area.[3]

When the complaint was filed, 102 of the 1359 teachers in Clark County elementary schools were black. Of the 102 black teachers, 83 were assigned to Westside schools, and only 19 to schools outside the area. These figures appear to be representative of prior years.[4]

III

The Constitutional Violation

Defendants argue that under *Swann v. Board of Education, supra,* 402 U.S. 1, a school district is re-

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[2]The school district points out that counsel stipulated that these schools were closed because of their physical condition. But counsel did not stipulate that this was the sole reason for the closings. Defendant Guinn, Superintendent of Schools, testified that the schools were closed in part because it was foreseen that the student body would become increasingly black due to changing residential patterns. The reply brief filed on behalf of the school district agrees that this was one reason for the closings. It is not suggested that these schools could not have been renovated for continued elementary school use, as other schools in Westside were. Both schools are still used for special classes and other educational purposes.

[3]The present policy of Clark County School District is to phase out "neighborhood" elementary schools in Westside. No new elementary schools have been built in Westside since 1966.

[4]Plaintiffs argue that the evidence also shows (1) that white students were bused to white schools although Westside black schools were closer to their homes; (2) that efforts of Westside black students to transfer to white schools were frustrated; (3) that attendance zones were manipulated to perpetuate black segregation in Westside schools; (4) that only Westside schools were treated as "neighborhood" schools, and busing was common outside Westside. However, either the facts asserted or their significance are disputed. The district court did not resolve these disputes either by express findings or by clear implication.

quired to integrate racially imbalanced schools only if the school district caused the racial imbalance. Defendants contend that the segregated conditions in Clark County's elementary schools do not result from discriminatory acts or omissions of the school district. They maintain that the school district is simply adhering to a neighborhood school policy under which children are assigned to schools nearest their homes. They claim that whatever inbalance exists stems not from any official action of the school district but rather from the racial composition of the Westside population which is almost completely black

Defendants point out that the *Swann* case involved a school district "having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." 402 U.S. at 5-6. Defendants claim that there has been no finding that the segregated condition in Clark County elementary schools are a result of such official action. Therefore, since no constitutional violation by the school district has been established, and since, under *Swann*, there is no legal requirement that racial balance exist in every school (*see* 402 U.S. at 24), they conclude that they have no affirmative duty to integrate Clark County schools.

We agree with defendants that it is clear from *Swann* that a court has no power to order a school district to take steps to integrate its schools unless the court first finds that the schools have been operated in a manner violative of the Constitution. 402 U.S. at 16. Defendants are incorrect, however, in saying that the district court found no official action on their part constituting a constitutional violation.

In its judgment of December 2, 1970, the district court referred to the fact that the school district had adopted a construction policy with respect to junior and senior high schools that effectively eliminated segregation at those grade levels. The court then continued:

> "While eliminating segregation for the students above the sixth grade level, the District, at the same time, aggravated the incidence of segregation at the elementary level by constructing two new elementary schools[5] in the black residential area. This bifurcated neighborhood school policy of the Clark County School District is principally responsible for the aggravation of racial segregation in the elementary schools. The policy was implemented long after *Brown v. Board of Education*, 349 U.S. 294, had clearly abjured the employment of official power to further the maintenance of segregated schools. . . ."[6]

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[5]Four new schools were constructed. It is not clear why the district court referred to only two of them. It may have done so because the President of the Board of Trustees specifically admitted that segregated conditions were aggravated by the construction of these two schools.

[6]Whatever the district court may have meant by its occasional references to "de-facto segregation" in the Clark County School District, it is clear from the language of the district court quoted in the text that the court did *not* define the term, as the Supreme Court did in *Swann*, as referring to a situation "where racial unbalance exists in the schools *but with no showing that this was brought about by discriminatory action of state authorities.*" 402 U.S. at 17-18 (emphasis added).

In the hearing on the school district's motion to reconsider the December 2 judgment, the district court heard extensive argument that *Swann* required proof that racial imbalance in the schools resulted from discriminatory action by the school district. In colloquy with counsel, the district court indicated that it so understood the holding in *Swann*. The court rejected the motion to reconsider nonetheless, stating that nothing had been brought to the court's attention that would justify reconsideration of its judgment.

This is a clear finding that the school board furthered racial segregation by official conduct beyond the mere adoption and administration of a neutral, neighborhood school policy.[7] This finding is supported by the record, and establishes a constitutional violation.

Not surprisingly, the record contains no express mandate or sanction by any state agency of racial segregation in Clark County elementary schools. Historically, racial segregation has rarely been required by law in northern and western states. There was other evidence, however, to support the district court's ultimate finding that the Clark County School District used its official powers to further the maintenance of segregated schools.

1. The existence of almost total segregation of the races in the elementary schools of racially mixed Clark

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[7]We do not mean to suggest that we would agree with plaintiffs' assumption that the Constitution is not violated by implementation of a "neighborhood school" policy in a school district having racially segregated residential patterns when the foreseeable result is segregation of the races in the district's schools. That question remains open. It has been argued with some force that a school authority cannot ignore the obvious fact of racially segregated residential patterns in making decisions regarding school attendance zones, and that if it elects to impose so-called neighborhood school attendance zones upon racially segregated residential areas it is responsible for the racially segregated schools that are the readily foreseeable consequence of their conduct. Fiss, The Charlotte-Mechlenburg Case—Its Significance for Northern School Desegregation, 38 Chi. L. Rev. 697, 706-07 (1971); Fiss, Racial Imbalance in the Public Schools, 78 Harv. L. Rev. 564, 584-88 (1965); *see* Bradley v. Milliken, ... F. Supp. .... (E.D. Mich., Sept. 27, 1971), slip opinion at 23. Of course, under *Swann* any racially motivated manipulation of attendance zones violates the Constitution. *See* Dimond, Segregation Northern Style, 9 Inequality in Education (Harvard Center for Law & Education) 17, 19-20 (1971). The Supreme Court also pointed out that choices made by a school authority in locating schools may contribute to the creation of the residential segregation itself, making the school authority responsible for the school segregation resulting from the residential segregation. 402 U.S. at 20-21.

County School District is itself a relevant factor. As Chief Justice Burger said in *Swann v. Board of Education, supra,* 402 U.S. at 25-26: "Schools all or predominately of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation."

2. The almost completely black composition of the teaching staffs of Westside schools when the complaint was filed, combined with the district's methods of placing teachers (*see* note 8), established a prima facie case of violation of substantive constitutional rights.

This is settled by *Swann*. There the Court stated, "where it is possible to identify a 'white school' or a 'Negro school' simply by references to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection clause is shown." 402 U.S. at 18. *See Green v. County School Board,* 391 U.S. 430, 435 (1968).

This is not to say that racially balanced faculties are constitutionally required, for they are not. *See United States v. Montgomery Board of Education,* 395 U.S. 225, 236 (1969). Rather, teacher assignment is so clearly subject to the complete control of school authorities, unfettered by such extrinsic factors as neighborhood residential composition or transportation problems, that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of overall school policies and practices. "[T]he school district's obvious regard for race in assigning faculty members and administrators is a factor which may be considered in assessing motives

underlying past decisions which resulted in segregation." *Davis v. School District of Pontiac, Inc.*, 443 F.2d 573, 576 (6th Cir. 1971).[8]

3. The prima facie case of constitutional violation established by proof of virtually complete racial segregation of teachers in Clark County elementary schools was buttressed by the evidence showing that segregation of pupils by race was aggravated by the school district's practices in building new schools and abandoning old ones. As we have seen, while the Clark County School District built new elementary schools in the black residential area and in a distant white residential area, at the same time it closed existing schools in the fringe areas, in part to avoid their integration.

Like assignment of faculty by race, school construction policies that create or aggravate racial segregation are an "important indicia of a segregated system." *Swann v. Board of Education, supra,* 402 U.S. at 18. As the Court pointed out, choices made by school authorities in the location of schools

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[8]During oral argument in this court, defendants' counsel offered the suspiciously tardy suggestion that the school district may have acted on the theory that black students would respond better to black teachers, *see* Keyes v. School District No. 1, Denver, 445 F.2d 990, 1007 (10th Cir. 1971), *cert. granted* .... U.S. .... (Jan. 17, 1972). Counsel's suggestion is no substitute for proof in the trial court.

The inference of racial motivation is not weakened by the fact that teacher assignments were made primarily on the basis of requests by the principal of each school, or by the teachers themselves. Since the power to assign teachers clearly belonged to school authorities, the principals, or teachers, must be viewed as acting as agents of the school district in exercising that power, particularly when, as here, the power is exercised over a long period of time in a way that is obviously racially influenced. *See* Sedler, School Segregation in the North and West, 7 St. Louis L. J. 228, 236 (1963). While the school district could independently assign black teachers to schools outside Westside, the statistics reveal that this has seldom been done. *See* text accompanying note 4 *supra.*

> "having been used as a potent weapon for creating or maintaining a state segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown* [*v. Board of Education,* 349 U.S. 294 (1955)] closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' * * *
>
> In ascertaining the existence of legally imposed school segregation, the existence of a pattern of school construction and abandonment is thus a factor of great weight." 402 U.S. at 21.

See also United States v. Montgomery Board of Education, supra, 395 U.S. at 231.

4. Finally, the school district's decision to continue a "neighborhood" school policy at the elementary level while abandoning it at the secondary level for the very reason that the policy patently furthered racial segregation lends weight to the inference that the school district's purpose in constructing, renovating, and abandoning schools was to limit integration at the elementary level.

For these reasons we conclude that there was ample evidence to support the district court's finding that the Clark County School District used its power to aggravate segregation in elementary schools in violation of the Constitution.

IV

Remedy

A constitutional violation having been established, the district court properly called upon the Clark County School District to come forward with a plan to eliminate the vestiges of state-imposed segregation. The school district was "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. County School Board, supra,* 391 U.S. at 437-38. *See Swann v. Board of Education, supra,* 402 U.S. at 15.

The district court also properly rejected the school district's "freedom of choice" plan after a year's trial. "[A] school authority's remedial plan . . . is to be judged by its effectiveness," *Swann v. Board of Education, supra,* 402 U.S. at 26, and the freedom of choice plan proved entirely inadequate.

"Freedom of choice" plans usually, if not invariably, fail to eliminate school segregation. Such plans rest upon the theory that the school district's entire obligation is to refrain from excluding any student from any school because of race. But once it is determined that a school district has contributed to the creation and maintenance of segregation, neutrality is no longer enough. Then the school district's duty is not limited to the removal of discriminatory bars to school integration; it is charged with an affirmative duty to eliminate segregation.[9] "Freedom of choice" plans operate "sim-

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[9]Nor is the duty limited "to the correction of that portion of the segregation that might reasonably be attributable to past discrimination." Once it has been established that "past discrimination played *some* causal role in producing segregated patterns,"

ply to burden children and their parents with a responsibility which *Brown II* [347 U.S. 483] placed squarely on the School Board." *Green v. County School Board, supra,* 391 U.S. at 441-42. *See also Raney v. Board of Education,* 391 U.S. 443 (1968); *Monroe v. Board of Commissioners,* 391 U.S. 450 (1968). The attempt to shift responsibility rarely works. The parents and children are either unable or unwilling to carry the burden.[10] Not surprisingly, they failed to do so in this instance.

At the close of the school year in which the "freedom of choice" plan was in operation (1969-70), black student enrollment in five of the six Westside elementary schools exceeded 99 per cent, and stood at about 70 per cent in the Westside "prestige" school. White enrollment *decreased* in four of the six Westside schools during the year. In twenty-eight of the district's forty-four elementary schools located outside Westside, white enrollment remained at 100 per cent. In nine other elementary schools outside the area, white enrollment was 90-95 per cent, in five 80-90 per cent, and in two 70-80 per cent.[11]

Swann requires "the complete elimination of those patterns." Fiss, The Charlotte-Mechlenburg Case, *supra* note 7, 38 Chi. L. Rev. at 705.

[10]*See generally* United States Commission on Civil Rights, Southern School Desegregation 1966-'67, at 45-69 (1967).

[11]Faculty desegregation, also, is a "goal that we have recognized to be an important aspect of the basic task of achieving a school system wholly free from racial discrimination. See, *e.g., Bradley v. School Board,* 382 U.S. 103 (1965); *Rogers v. Paul,* 382 U.S. 198 (1965)." United States v. Montgomery Board of Education, 395 U.S. 225, 232 (1969). With respect to this aspect of the problem the district court concluded: "The evidence shows that the present policies have been and will be effective to establish a just ratio of white and black among the teachers

(This footnote is continued on next page)

The school district's initial plan having failed, the district court's power and duty to enter a remedial decree was clear. "If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Board of Education, supra,* 402 U.S. at 15. However, both the school district and plaintiffs criticize the specific remedy approved by the district court.

The parties join in opposing the provision of the December 2 judgment "that the black enrollment in any elementary school in the Clark County District shall not exceed fifty percent of the total enrollment in such grade."[12]

The school board's objection rests upon statements in *Swann* that the Constitution does not require a particular racial balance or mixture of races in public schools, and that the existence of a small number of one-race schools does not in and of itself establish a constitutional violation. 402 U.S. at 22-29.

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and administrators within the limitations of the available pool of qualified applicants. The Board has sincerely and effectively pursued its policies in this area."

Omissions and inconsistencies in the record make it impossible for us to determine the extent to which the elementary school faculties have been integrated. Plaintiffs have not raised this issue on appeal, and we wish to emphasize that we have not reviewed the district court's determination that adequate progress has been made in this area.

[12]The district court later orally amended the judgment to make it clear that enrollment in any single *class* was not to be more than 50 per cent black. By the terms of the amended judgment of February 8, 1971, the 50 per cent requirement did not apply in those "special classes involving federal or other remedial or experimental programs of the School District."

In these passages, the Court was speaking only of the proof necessary to establish the existence of the constitutional violation that is a prerequisite to any judicial remedy at all. Once a constitutional violation has been found, different considerations apply. Then both the school district and the court are obliged to take all necessary steps to eliminate the past violation and its continuing effects. The Supreme Court specifically approved use of a mathematical ratio as "a useful starting point in shaping a remedy to correct past constitutional violations," 402 U.S. at 25; and warned that whenever a proposed remedial plan contemplated the continuance of schools all or predominately of one race, "The Court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part." 402 U.S. at 26.

As we have said, the district court found on legally and factually sufficient grounds that the one-race composition of Westside elementary schools was due in part to school district conduct violative of the Constitution. Although the school district's "freedom of choice" plan resulted in some integration in one Westside school, it failed to affect the one-race composition of the remaining five. The district court's order simply required that, in any new plan formulated by the school district, black enrollment in any class must not exceed 50 per cent. The court did not impose a fixed racial ratio upon classes in the school system—some classes might have 45 per cent black students, some 15 per cent, some none. The 50 per cent figure is a ceiling for black enrollment imposed for the purpose of compelling a real beginning toward eliminating the effects of past segregative practices.

Plaintiffs argue that the district court did not go far enough—that the court should have ordered the school district "to avoid schools substantially disproportionate to the system-wide racial enrollment"; and that a "50% black school in Las Vegas is substantially disproportionate."

We are satisfied that "the very limited use made of mathematical ratios was within the equitable discretion of the District Court." *Swann v. Board of Education, supra,* 402 U.S. at 25. The district court has broad discretion in framing an equitable decree. 402 U.S. at 15-16; *Brown v. Board of Education,* 349 U.S. 294, 300-01 (1955). The present decree is the beginning, not the end, of the remedial process. No doubt it will be modified and adjusted in the light of progress made in the elimination of effects of segregation.

Plaintiffs' principal complaint is that the "Sixth Grade Center Plan" imposes a disproportionate burden upon black students because black students in the first five grades will be bused, but only white students in the sixth grade. Plaintiffs point out that all black junior and senior high school students in the Westside area are already being bused to schools outside the area. They propose an alternate plan under which each Westside school would be "paired" with three white schools outside the area.

The school district offers several responses. It claims that the "Sixth Grade Center Plan" is based upon sound educational principles and does not burden black students disproportionately. The number of white and black students to be bused is about the same. All schools, families, and children in the district will be involved in the integration effort, rather than the select few under plaintiffs' alternative plan. The district

argues that plaintiffs' alternative "pairing" plan would also permit whites to escape integration by moving to the attendance zone of a school not involved in the plan. The district's plan involves the least separation of siblings and provides the best racial mixing of staff since all sixth grade teachers will be together. Finally, the school district claims that its plan is the most economical.

There is a wide range of views regarding the propriety of such plans.[13] We need not evaluate the arguments pro and con in this case, however. The burden rested upon plaintiffs, as appellants, to establish that the district court exceeded its broad discretion in approving the particular plan involved here, and clearly plaintiffs did not sustain that burden.

The record before us does not contain a copy of the plan or even a description from which its details might be determined. We have the transcript of the hearings on plaintiffs' motion to modify the plan. However, the transcript contains neither a precise description of the plan nor specific information regarding the plan's mechanics or probable effects. On this record we cannot judge the desirability of the "Sixth Grade Center Plan," much less whether the district court abused its discretion in approving it.

The district court exercised close supervision over the implementation of the prior "freedom of choice" plan, and did not hesitate to set that plan aside when it proved ineffective. We have no doubt that it will re-

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[13] *Compare, e.g.,* Swann v. Charlotte-Mechlenburg Board of Education, 328 F. Supp. 1346, 1351-52 (W.D.N.C. 1971) [disapproving such a plan], *with* Mims v. Duval County School Board, 329 F. Supp. 123, 132-33 (M.D. Fla. 1971) [approving such a plan].

spond in the same way upon a proper showing that the "Sixth Grade Center Plan" is operating in a way that is either ineffective or unfair.

V

Attorneys' Fees

We accept plaintiffs' position that in the exercise of equitable jurisdiction a trial court may award the prevailing party counsel fees and other litigation expenses not ordinarily taxable as costs. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 164-66 (1939).

The discretion of the trial judge in this area is necessarily broad and the scope of appellate review correspondingly narrow. Applying these principles, we have concluded that the trial court acted within its discretion in declining to award attorneys' fees.

We base our decision primarily upon two grounds. First, there was substantial doubt as to the school district's legal obligation in the circumstances of this case; the district's resistance to plaintiffs' demands rested upon that doubt, and not upon an obdurate refusal to implement clear constitutional rights. Second, throughout the proceedings the school district has evinced a willingness to discharge its responsibilities under the law when those duties were made clear. The school district complied with the court's initial desegregation order, promptly submitting the "freedom of choice" plan and working to see it succeed. Following the court's judgment of December 2, 1970, the school district proceeded without delay to formulate the "Sixth Grade Center Plan," and was prepared to implement this plan until the judgment was stayed by the district court's order. A different result would be appropriate if the school district had proved recalcitrant in the face

of the lower court's decree. *See generally Lee v. Southern Home Sites Corp.*, 429 F.2d 290, 295-96 (5th Cir. 1970); *Bradley v. School Board*, ... F. Supp. .... (E.D. Va. May 26, 1971), slip opinion at 18-20.

VI

Stay

In special findings relating to the stay, the district court found that the "Sixth Grade Center Plan" could be implemented in the course of the school year without undue disruption of the educational process. Those findings, however, were entered at the beginning of the 1971-72 school term. The term is now well into its second semester. We do not know whether the findings accurately reflect the present situation. It would seem advisable, therefore, to require plaintiffs to resubmit their request that the stay be vacated to the district court where the feasibility of immediate implementation of the "Sixth Grade Center Plan" can be explored.

Affirmed.

APPENDIX C.

June 23, 1969 Order.

In the United States District Court, for the District of Nevada.

Herbert E. Kelly, Sr., et al., Plaintiffs, vs. Richard Brown, Acting Superintendent of Schools, et al., Defendants and Intervenors. Civil No. LV-1146.

At the conclusion of a partial trial held October 14, 15 and 16, 1968, in Las Vegas, Nevada, this Court entered a preliminary order requiring the Clark County Board of School Trustees to present to the Court a plan for the integration of the six Westside elementary schools on or before April 10, 1969. The plan of the board, entitled "An Action Plan for Integration of the Six Westside Elementary Schools" was filed with the Court on April 10, 1969, and a hearing on the plan and objections thereto and proposed alternative solutions was held on May 28 and 29, 1969.

The Court is indebted to the interested citizens and parties who have unselfishly contributed their time, research and informed opinions in an effort to achieve efficient and effective integration of the Westside elementatry schools. These contributions are not wasted, although their manner of presentation implies a misconception of the function of a Court in this situation. The Board of School Trustees is the governing board of the School District, responsible for its policies and management within the requirements of the law. The plan it has proposed has possibilities of successfully solving the problem and should be approved until proven unworkable. The added difficulties created by the resignation of Dr. James I. Mason as Superintendent of the School District prompt caution until his

successor is established and becomes familiar with the problems and possible solutions. Approval of the plan presented on a trial and error basis will not require wasteful or irreversible changes in school administration and policies. Accordingly, *IT HEREBY IS ORDERED:*

1. The plan entitled "An Action Plan for Integration of Six Westside Elementary Schools", filed with the Court on April 10, 1969, is hereby approved and the Clark County Board of School Trustees is ordered to put said plan into effect the school year commencing in September, 1969.

2. On or before October 15, 1969, defendants shall file with the Clerk of this Court a report of accomplishments with respect to staff redeployment and integration in effective implementation of the plan.

3. On or before March 1, 1970, the defendants shall file with the Clerk of this Court a report of its accomplishments toward effective integration of the six Westside elementary schools, together with any suggested modifications of the plan deemed necessary for more fruitful attainment of its objectives.

4. The Court retains jurisdiction to make such further or different orders as may appear necessary or proper.

Dated: June 23, 1969.

/s/ Bruce R. Thompson

UNITED STATES DISTRICT JUDGE

APPENDIX D.

December 3, 1970 Judgment and Decree.

In the United States District Court, for the District of Nevada.

Herbert E. Kelly, Sr., et al., Plaintiffs, vs. Richard Brown, Acting Superintendent of Schools, et al., Defendants. Civil No. LV-1146.

While this Court would like to await reception of the Supreme Court opinions in the six integration cases argued the middle of October, the pressure of time suggests the desirability of now entering orders to be put into effect in the Clark County elementary schools during the 1971-1972 school year. Time must be allowed for the planning required to implement any orders made.

The existing plan in operation under tentative approval has not proved adequate or effective to accomplish elementary school integration and it is not anticipated that further pursuance of the present plan will substantially change the white-black pupil ratio in the Westside elementary schools at any time in the future.

The neighborhood school concept must be abandoned to accomplish integration in a racially segregated residential area. Because of the demonstrated reluctance of white parents to volunteer their children for education in the Westside schools, the burden of accepting bussing to accomplish elementary school integration has been placed on the black parents. While the latter have evinced an increasing acceptance of such bussing for their children, it cannot be inferred from the evidence before the Court that the present plan will ever eliminate an almost one hundred per

cent population of black students in the Westside elementary schools so long as such schools are maintained and operated.

The C.V.T. Gilbert prestige elementary school has been successful in accomplishing substantial integration in that school. It cannot, however, be inferred from the evidence that funds are available or planning in progress to integrate the Westside elementary schools as a whole, or even in substantial part, by further extension of this aspect of the District's voluntary integration program.

Other aspects of the District's present plan are useful and disclose an enlightened attitude in the Board regarding the social problems inherent in segregated schools. There is, nevertheless, little reason for hope that continuation of the present plan will accomplish reasonable integration in the elementary schools in this generation. The longer segregated schools are permitted to continue, the less the prospect of integration in future generations.

The problem in Clark County is unique and, from some points of view, less critical than in other urban areas where residential segregation, combined with the neighborhood school concept, has dictated segregated schools. The senior and junior high schools are fully integrated, this because the school district abandoned the neighborhood school policy at these levels of education. There are no senior or junior high schools in the Westside residential area. While eliminating segregation for the students above the sixth grade level, the District, at the same time, aggravated the incidence of segregation at the elementary level by constructing two new elementary schools in the black residential

area. This bifurcated neighborhood school policy of the Clark County School District is principally responsible for the aggravation of racial segregation in the elementary schools. The policy was implemented long after *Brown v. Board of Education*, 349 U.S. 294, had clearly abjured the employment of official power to further the maintenance of segregated schools. The present members of the Board may not be personally responsible for the actions of their ancestors in office, but we are concerned with a school district and its policies and actions, and not with the particular people who may have been vested with control from time to time. Quite realistically, the present Board is saddled with the mistakes of its predecessors and is obligated to take effective steps to reverse the segregation trend, however drastic the cure may be.

Some of the proponents of integration in this case plead for mathematical perfection. It has been contended that the only acceptable plan must provide for the same ratio of black to white in every elementary school. But ours is not simply a problem in mathematics to be solved by counting noses. Economic and geographical considerations are also important. A completely segregated all-white school may well be as sociologically undesirable as a segregated black school but the essence of the present problem is the black elementary schools in the Westside, not the white schools elsewhere. Any plan which accomplishes a reasonable admixture of the races in the elementary student population is acceptable.

This Court is still wedded to the principle that solution of the problem is primarily the responsibility of the school district. The Court has no intention of directing specific action or the implementation of a

specific plan at this time. It does intend to exercise its judicial responsibility to direct broad objectives effectively to accomplish integration. The problems of economics, zoning, logistics, personnel and the like must be left for solution by those best versed in the art. It, nevertheless, should be clear that an acceptable plan of integration cannot embrace destructive devices such as the abandonment of useful physical facilities, the imposition of double sessions, the allowance of unreasonable pupil-teacher ratios, the elimination of transportation services or other conditions calculated to downgrade the present high standards of educational opportunity in the district or to cater to the prejudices of particular parents who are opposed to effective integration.

Plaintiffs also complain of racial distortion in the academic and professional staff. These criticisms are unjustified. The evidence shows that the present policies have been and will be effective to establish a just ratio of white and black among the teachers and administrators within the limitations of the available pool of qualified applicants. The Board has sincerely and effectively pursued its policies in this area.

We have alluded at the outset to cases now pending before the Supreme Court which, when decided, may throw considerable light upon the judicial responsibility in the field of de facto segregation. If those decisions should be in conflict with the orders contemplated by this Court as reasonable to effectuate integration, there will, in all probability, be time to reconsider them. The entry of a judgment now will enable defendants to institute planning for effective integration subject to whatever revisions may be required by the anticipated pronouncements from the High Court.

The Court also has in mind the imminence of a session of the Nevada Legislature, a factor which suggests the desirability of a prompt order. Planning for effective integration will have an impact on the school district budget. The bare essentials of added expense will be in the costs of transportation and the administrative staff for planning and execution of the plan. The evidence shows that many of the school district costs now allocated as integration expenses might more properly be attributed to the general expense of maintaining high quality educational opportunities for all the elementary school children of Clark County. The C.V.T. Gilbert Prestige School, as well as the Kit Carson remedial reading program, has these attributes. The effort to use these programs to further the cause of integration should not, of course, be denigrated. Whatever the added costs of effectuating the court orders may be, the school district should have an opportunity to seek legislative relief from its financial woes. Clark County is the only school district which has an integration problem. A state-wide formula for school support which does not take into account this special situation of one district cannot equitably provide for the requirements of the Clark County School District. Accordingly, *IT HEREBY IS ORDERED, ADJUDGED AND DECREED:*

1. The elementary schools in the Westside area of Las Vegas, Nevada, shall be desegregated with the result that the black student enrollment in any grade level in any elementary school in the Clark County

School District shall not exceed fifty per cent of the total student enrollment in such grade.

2. The Board and Administrators shall forthwith adopt and effectuate an integration plan in compliance with the foregoing order, using whatever devices are available (e.g., rezoning, pairing of schools, voluntary bussing, enrichment programs to attract volunteers, and directive placement of students in designated schools, perhaps by lot), with the result that the elementary school pupil attendance will be so integrated upon the commencement of the 1971-1972 school year.

3. The plan effectuated shall not be permitted to result in a distortion of the pupil-teacher ratio in any class in comparison with the average pupil-teacher ratio of all elementary schools in the metropolitan area of Las Vegas, allowing a tolerance of ten per cent, and excepting specialized schools such as the C.V.T. Gilbert Prestige School.

4. If not otherwise required by the unavailability of plant facilities and increased elementary school enrollment in the District, the plan shall not include the establishment of double sessions at any elementary school.

5. The existing policies respecting the furnishing of transportation services to elementary students shall not be modified to the detriment of students whose placement is affected by the integration plan.

6. In the event a "middle" school plan is effectuated by the District, such schools to include one or more of the present elementary grades, the schools shall be integrated in compliance with the foregoing requirements.

7. The defendants shall file a report in this action on or before November 1, 1971, demonstrating the accomplishment of the integration objectives contemplated by the foregoing orders.

The Court retains jurisdiction to modify, amend or amplify the foregoing orders in any manner which may be made to appear to be reasonable and proper.

Dated: December 2, 1970.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX E.

February 9, 1971 Amended Judgment and Decree.

In the United States District Court, for the District of Nevada.

Herbert E. Kelly, Sr., et al., Plaintiffs, vs. Richard Brown, Acting Superintendent of Schools, et al., Defendants. Civil No. LV-1146.

The motion of defendants for modification and clarification of the Judgment entered December 3, 1970, duly came on for hearing before the Court on January 19, 1971, at Las Vegas, Nevada. After consideration of the problems discussed and good cause appearing.

IT HEREBY IS ORDERED that the Judgment entered December 3, 1970 be, and it hereby is, amended to provide as follows:

1. The elementary schools in the Westside area of Las Vegas, Nevada shall be desegregated with the result that the black student enrollment in any grade level and in any class in any grade level in any elementary school in the Clark County School District shall not exceed fifty per cent of the total student enrollment in such class or grade. This per cent requirement shall not apply in those special classes involving federal or other remedial or experimental programs of the School District.

2. The Board and Administrators shall forthwith adopt and effectuate an integration plan in compliance with the foregoing order, using whatever devices are available (e.g., rezoning, pairing of schools, voluntary bussing, enrichment programs to attract volunteers, and directive placement of students in designated schools, perhaps by lot), with the result that the elementary

school pupil attendance will be so integrated upon the commencement of the 1971-1972 school year.

3. The plan effectuated shall not be permitted to result in a distortion of the pupil-teacher ratio in any class so as to discriminate in those classes involved in the integration plan, and excepting specialized schools such as the C.V.T. Gilbert Prestige School.

4. If not otherwise required by the unavailability of plant facilities and increased elementary school enrollment in the District, the plan shall not include the establishment of double sessions at any elementary school.

5. The existing policies respecting the furnishing of transportation services to elementary students shall not be modified so as to discriminate against the students whose placement is affected by the integration plan.

6. In the event a "middle" school plan is effectuated by the District, such school to include one or more of the present elementary grades, the schools shall be integrated in compliance with the foregoing requirement.

7. The defendants shall file a report in this action on or before November 1, 1971, demonstrating the accomplishment of the integration objectives contemplated by the foregoing orders.

The Court retains jurisdiction to modify, amend or amplify the foregoing orders in any manner which may be made to appear to be reasonable and proper.

Dated: February 8, 1971.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

APPENDIX F.

August 13, 1971 Special Findings of Fact.

In the United States District Court, for the District of Nevada.

Herbert E. Kelly, Sr., et al., Plaintiffs, vs. Kenny C. Guinn, Superintendent of Schools, Clark County School District, et al., Defendants. Civil No. LV-1146.

The Court has received the following telegram from the Court of Appeals:

> "REGARDING KELLY VS GUINN UNDOCKETED LV-1156.
>
> "JUDGES CHAMBERS AND BROWNING TODAY ENTERED AN ORDER AS FOLLOWS: THE COURT OF APPEALS REQUESTS THE DISTRICT COURT TO MAKE A FINDING NOW AS TO WHETHER AT THIS LATE DATE IF THE DISTRICT COURTS ORDER FOR A STAY OF ITS FINAL JUDGMENT OR DECREE IS DISSOLVED BY THIS COURT, IS IT POSSIBLE OR PRACTICAL FOR THE SCHOOL DISTRICT TO IMPLEMENT A PLAN BY THE SEPTEMBER DATE ON WHICH THE LAS VEGAS SCHOOLS WILL OPEN. ALSO, IS IT PRACTICAL TO PUT A PLAN IN EFFECT, SUBSEQUENTLY DURING THE SCHOOL YEAR. IN CONSIDERING PENDING MOTIONS, THE COURT HAS BEEN HANDICAPPED BY THE FACT THAT NO ONE HAS YET FURNISHED THIS COURT WITH THE DISTRICT COURTS FINDINGS OR JUDGMENTS SIGNED EMIL E. MELFI ACTING CHIEF DEPUTY CLERK."

Responsive thereto, the Court now finds the following additional facts:

1. It was practical at the time of the hearing in early June, 1971, and is now practical for the Clark County School District to implement its proposed plan of elementary school integration effective with the commencement of the 1971-1972 school year in September, 1971. The plan in general contemplates that the Westside Elementary Schools will be used for all sixth grade students and that grades kindergarten through fifth grade will be assigned to elementary schools outside the Westside Area, no class to have more than fifty per cent black enrollment.

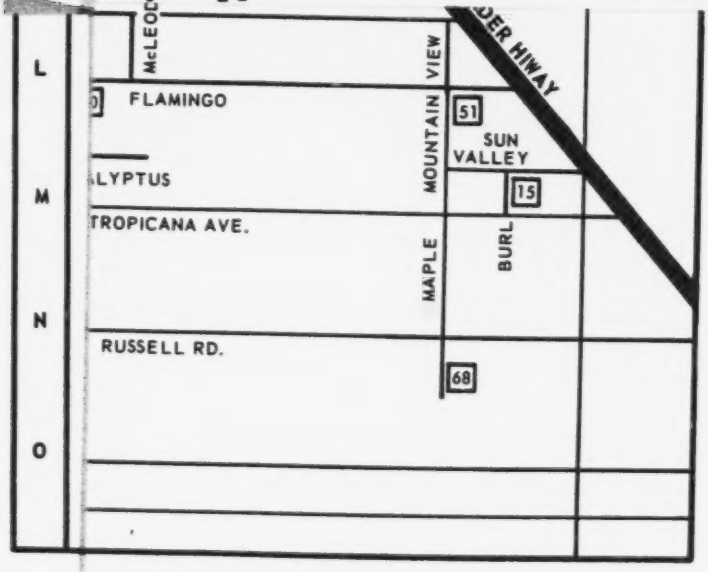
2. The integration problem in Clark County is not critical. For years, the high schools and junior high schools have been fully integrated. The substantial segregation found to exist in elementary schools is the consequence of residential patterns aggravated by adherence to the neighborhood school concept in school construction and maintenance. There is strong local resistance to extensive bussing of elementary school children. The Courts of Appeals and the Supreme Court have not to this date spoken clearly and plainly with respect to a school district's responsibilities concerning problems of de facto segregation. The school authorities of Clark County are justifiably doubtful of their duties and responsibilities and the power and authority of the judiciary in the premises. This Court weighed all matters before it in reaching the conclusion that a stay of implementation of the integration plan was justified

pending an authoritative determination of the difficult legal issues, believing that after such a ruling, the community resistance to the school district's efforts to accomplish elementary school integration will be substantially dissipated and a peaceful solution anticipated.

Dated: August 13, 1971.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

	G-3	65. Las Vegas High	G-6
	J-10	66. Rancho High	E-7
	L-11	67. Valley High & Evening High	J-8
lligh	C-10	68. Voc. Tech Center	N-11
r. High	G-1	69. Western High	F-2
	G-3	70. Educ. Center; Whse & Maint.	L-9
High	K-2	71. NSEA Offices, 970C-E. Sahara	I-6
h	D-7	72. Univ. of Nevada, Las Vegas	M-6
r. High	C-1	73. State Building	F-5
h	C-6	74. *Gene Ward	N-7
. High	I-7	75. *Myrtle Tate	C-10
High	I-9	76. *Cyril Wengert	I-12
lr. High	E-2		



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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-341

KENNY C. GUINN, Superintendent of Schools,
Clark County School District, *et al.*,

Petitioners,

VS.

HERBERT E. KELLY, SR., *et al.* and LEAGUE OF WOMEN VOTERS OF LAS VEGAS VALLEY, a Non-Profit Organization.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-341

KENNY C. GUINN, Superintendent of Schools, Clark County School District, *et al.*,

Petitioners,

vs.

HERBERT E. KELLY, SR., *et al.* and LEAGUE OF WOMEN VOTERS OF LAS VEGAS VALLEY, a Non-Profit Organization.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the district court's desegregation order is now reported at 456 F.2d 100. The district court opinions and orders herein are unreported and are reprinted in the Appendix to the Petition.

Jurisdiction

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals denying rehearing was entered on April 3, 1972. On June 3, 1972, Mr. Justice Douglas extended the time for filing the Petition to and including August 31, 1972.

Questions Presented

1. When school authorities by conscious choice make decisions affecting the location, grade structure and capacity of school buildings, the size and perimeters of attendance zones by which students are assigned to these schools, and the assignment of faculties and staffs to those schools, all of which result in the maintenance and increase of racially identifiable and segregated schools, does the absence of an explicit state-wide mandate compelling such segregation render the school authorities' actions lawful?

2. May a federal district court devising a remedy for Fourteenth Amendment violations in accord with the principles of *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), require—where there are no practical difficulties of the sort envisaged in *Swann*—that the plan be designed so as to avoid assignment of more than 50% black students to any school in a system wherein black students make up only a small proportion of the total student population?

Statement

This school desegregation action was commenced against the Clark County School District, Nevada, in 1968. Following a hearing and finding of illegal segregation, the district court retained jurisdiction and permitted the school board to attempt to comply with its responsibility to eliminate that segregation by implementing an open enrollment or free choice plan. In 1970 the court reviewed progress under the plan at an evidentiary hearing and ordered adoption of new measures incorporating mandatory assignment of pupils to the end that no Clark County

district school should be more than 50% black. (With respect to faculty, the court held that injunctive relief was not required because the board had adopted policies which promised effectively to redress the previous disproportionate assignment of black teachers to black schools in the district).

Following this Court's decision in *Swann, supra,* the district court reconsidered its decision in light thereof pursuant to a remand from the Court of Appeals for that purpose, and reaffirmed its holding that the Clark County School District was constitutionally obligated to desegregate its schools. The Court of Appeals affirmed, holding that the guidelines in *Swann* had been properly applied.

Statement of Facts

At the time this lawsuit was filed, some 4,978 black students attended six westside Las Vegas elementary schools, each of which was over 95% black in student enrollment (10/68 Tr. 199, 388, 412; DX 17)[1] and each of which had a faculty disproportionately black in comparison to other schools in the system DX 16). The students attending these schools were, on the average, a year behind the students attending predominantly white Las Vegas schools in achievement test scores (10/68 Tr. 413; 5/69 Tr. 48).

At the secondary level there was no school in which similar numbers of black students were concentrated. A predominantly black westside junior high school had been closed in 1956 (10/68 Tr. 200) and its students dispersed to other schools in the system (10/68 Tr. 150-51). At that time as well, some of the now-black westside elementary

[1] Citations are to the original record before the Court of Appeals, which respondents have requested be transmitted to this Court. Transcript citations are identified by page and date of hearing.

schools had significantly larger white enrollments (*e.g.*, 10/68 Tr. 200). However, although the white and black school population of the district subsequently grew about the same rate, black students at the elementary level were increasingly isolated in heavily black westside elementary schools.

There were, of course, a variety of factors which brought about this result. Housing in the Las Vegas area was tightly segregated and Negroes were generally confined to the west side,[2] a fact known to the school authorities (10/68 Tr. 73, 220, 258, 451; 8/70 Tr. 83). Yet the district closed schools on the fringe areas of the westside Negro community (6/71 Tr. 100-01) and replaced them with new elementary schools built in the heart of black areas (10/68 Tr. 201; 5/69 Tr. 302). At the same time, federally assisted low-income housing projects on the west side swelled the impaction of black residents (*e.g.*, 10/68 Tr. 251, 314-15; 8/70 Tr. 160; *cf.* 8/70 Tr. 50); it has been only very recently that such projects have begun to be located outside the traditionally black westside area (6/71 Tr. 70-71).

The school district claims to have been following a "neighborhood school policy" in these matters, merely responding to the demands of local growth in determining both its site locations and its school attendance policies. However, it is significant that at the time of the hearings there were only six "neighborhood" schools in the Las Vegas area to which no students were bused; five of these were black, westside elementary schools (6/71 Tr. 237, 239). Under the district's attendance plan, considerable numbers of white students were transported to school buildings

[2] Nevada passed an open housing statute in 1970 (6/71 Tr. 48), two years after the federal Fair Housing Act of 1968 went into effect. See also *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). But the effects of racially discriminatory housing practices are longstanding. See 10/68 Tr. 221.

other than those closest to them (5/69 Tr. 121; 8/70 Tr. 221; 6/71 Tr. 237), including white students being transported to white schools and by-passing one of the black west side schools (5/69 Tr. 96, 122-23; 6/71 Tr. 301; *see* 10/68 Tr. 428-29).

The school district says it did not take the racial effect of its school construction policies into account until 1966 when it determined to build no more black schools on the west side[3] (10/68 Tr. 330, 354); however, its new facilities have generally not been filled to capacity when they open (10/68 Tr. 163; 8/70 Tr. 394) and school construction generates increased settlement in the immediate area (10/68 Tr. 372, 379; 5/69 Tr. 258). In the context of residential segregation in Las Vegas, therefore, the district's construction policies made the situation worse. As recently as 1969, the district was building a new school in a white suburb to relieve overcrowding at nearby white schools (5/69 Tr. 107-08) although black schools were underutilized (10/68 Tr. 143, 168-69).

The school district also helped to create and maintain the pattern of racially identifiable schools by restricting the transfer right of black students at the westside schools (10/68 Tr. 80, 254) and by failing to utilize yearly attendance zone changes to increase desegregation (*compare* 10/68 Tr. 163, 8/70 Tr. 367 *with* 6/71 Tr. 301). Traditionally it has assigned its few black elementary teachers to the westside schools (*e.g.*, R. 115); the district had never *assigned* a black teacher to a white school before 1969 (after this action was filed) (10/68 Tr. 438). The school district recently has undertaken an extensive renovation program at the westside schools in order to "make them

[3] Jo Mackey Elementary opened in 1965 and C.V.T. Gilbert in 1966 (10/68 Tr. 142, 151).

equal to other schools in the District . . ." (10/68 Tr. 354; 8/70 Tr. 229).

Reasons Why the Writ Should Be Denied

The School Board's primary contentions in support of its request for review of this matter seem to be that the courts below wrongly decided factual issues concerning the responsibility of school authorities for segregation in Clark County and that the decision is in conflict with rulings of other Courts of Appeals.

In its Statement of the Case and in general throughout the Petition, the District attempts to characterize its operations as merely following a neutral, neighborhood school doctrine. The courts below explicitly held that this was not the case in Las Vegas:

> This is a clear finding that the school board furthered racial segregation by official conduct beyond the mere adoption and administration of a neutral, neighborhood school policy. [footnote omitted] This finding is supported by the record, and establishes a constitutional violation.

456 F.2d at 106 (Appendix to Petition at p. 10). The Court of Appeals reviewed the findings of the district court which justified the conclusion that Clark County school authorities knowingly took actions which resulted in the establishment, maintenance, or aggravation of segregated schools on the westside of Las Vegas. See 456 F.2d at 106-08 (Appendix to Petition at pp. 10-13). Additional evidence relied upon by the plaintiffs was not directly used by the Court of Appeals to buttress its conclusion because the district court had not made findings thereon, but examination of the record will make apparent the solid basis upon

which the district court made its finding of constitutional violation. See 456 F.2d at 105, n.4 (Appendix to Petition at p. 7).[4]

There is some language in the opinions of the district court which is ambiguous because it employs the "de facto" school segregation terminology. The Court of Appeals properly viewed the lower court's order as being grounded upon a correct interpretation of the law as enunciated by this Court in *Swann, supra*, irrespective of the terminology employed. See 456 F.2d at 106, n.6 (Appendix to Petition at p. 9).

The arguments in the Petition can be reduced to the simple assertion—which the District in fact made below—that the Constitution applies only to States which compelled segregation by statute. But such statutes merely make the proof of state-created segregation relatively simple; they do not delimit the reach of the equal protection clause. "De jure" segregation can still be proved—as in this case—by showing official action resulting in segrega-

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[4] Attached to this Brief as Appendix A we have reproduced a Supplemental Brief filed following oral argument below, which describes some of the evidence demonstrating how this school district

> since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns . . . [and built] new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning."

Swann, supra, 402 U.S. at 21. The Supplemental Brief also discussed the construction of new black schools in areas of black concentration and the drawing of attendance boundaries so that the new schools continued to serve only that part of the school district formerly served by the older black schools, and the school system's failure, while it "continually adjust[ed] attendance boundaries of schools" (Petition, p. 11) to ameliorate racial segregation in Las Vegas schools.

tion or discrimination in the absence of statute, as such discrimination can be proved in, for example, jury discrimination cases. Thus, *Swann* cannot be read in the narrow way that the District suggests. This Court was, of course, dealing with segregation originally imposed pursuant to statute. But the lengthy discussion of issues such as school placement, attendance zones, and faculty ratios makes it clear that constitutional violations arise by school board actions that create or perpetuate segregation even in the absence of a statute.

This case involves a school district in which segregation has been brought about and maintained by regular, systematic and deliberate choice of the school authorities. While the district court may have labelled the school system's stubborn adherence to a "neighborhood school policy" in the black westside schools (R. 513), or its deliberate construction of new "neighborhood" (and consequently black) schools in that area (R. 514), "de facto" segregation (10/68 Tr. 501) because neither had Nevada law ever required segregation nor had the school district ever openly advocated it as formal policy, the lower court's order was specifically grounded upon the official action of the school district in maintaining and aggravating segregation long after *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (R. 514; Appendix to Petition at p. 26).

Not only are Petitioners seeking to controvert factual findings clearly supported by the record, but they have conjured up non-existent conflicts with the decisions of other Courts of Appeals in an effort to create issues meriting the review of this Court. For example, in *Keyes* v. *School District, No. 1, Denver*, No. 71-501 (argued October 11, 1972), the Denver school system made the same argument advanced by the Petitioners below respecting segregation of its Park Hill area schools: that it followed a

neighborhood school policy which required it to construct new schools in this region of increasing black population despite the availability of classroom space elsewhere in the system. The Denver district court held that the reasonably foreseeable result of the policies knowingly adopted by the school board—segregation—imposed upon the Board the constitutional obligation to eliminate that segregation. The Court of Appeals affirmed on this issue and this Court has not acted upon the school board's cross petition for certiorari as to this matter, No. 71-572. The standard applied by the district court and the Tenth Circuit in *Denver* is precisely the standard applied by the courts below in measuring the constitutionality of the Clark County School District's policies and practices resulting in segregation.

As we noted above, the courts below specifically found that the Clark County School District authorities were not innocently pursuing a neutral, neighborhood school policy which resulted in racial imbalance in existing schools solely because of population changes. That distinguishes this case from *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 846 (1967), 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971) and *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd* 404 U.S. 1027 (1972), in each of which there was no finding that segregation resulted from the actions of school authorities.

The Fifth Circuit cases cited at pages 21 and 22 of the Petition, as purportedly giving rise to a conflict among the Circuits, were all decided prior to this Court's ruling in *Swann, supra,* and their limited remedies are insufficient under the principles of *Swann.* Indeed, these decisions were relied upon in *Davis* v. *Board of School Comm'rs of Mobile County*, 430 F.2d 883, 889 (5th Cir. 1970), *rev'd in part*, 402 U.S. 33 (1971), and the limited desegregation plans they approved have been altered since *Swann. Com-*

pare Ellis v. *Board of Public Instruction of Orange County,* 465 F.2d 878 (5th Cir. 1972); *Mannings* v. *Board of Public Instruction of Hillsborough County,* Civ. No. 3554-T (M.D. Fla., May 11, 1971).

The Courts of Appeals are in agreement that actions such as those of the Clark County School District which perpetuate or result in school segregation violate the Fourteenth Amendment to the Constitution. *Davis* v. *School Dist. of Pontiac,* 309 F. Supp. 734 (E.D.Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir.), *cert. denied,* 404 U.S. 913 (1971); *Cisneros* v. *Corpus Christi Ind. School Dist.,* 5th Cir., No. 71-2397 (August 2, 1972); *United States* v. *School Dist. No. 151,* 286 F. Supp. 786 (N.D. Ill. 1966), *aff'd* 404 F.2d 1125 (7th Cir. 1968), 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd* 432 F.2d 1147 (7th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *cf. Brewer* v. *School Bd. of Norfolk,* 397 F.2d 37 (4th Cir. 1968); *Henry* v. *Clarksdale Municipal Separate School Dist.,* 409 F.2d 682 (5th Cir.), *cert. denied* 396 U.S. 940 (1969); *Sloan* v. *Tenth School Dist. of Wilson County,* 433 F.2d 587, 589 (6th Cir. 1970); *Clark* v. *Board of Educ. of Little Rock,* 426 F.2d 1035 (8th Cir. 1970), 449 F.2d 493 (8th Cir. 1971); *United States* v. *Board of Educ.,* 429 F.2d 1253 (10th Cir. 1970).

There is no singular issue in this case which merits the attention of this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents pray that the Writ be denied.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 71-2332

HERBERT E. KELLY, SR., *et al.*,

Plaintiffs-Appellees,

v.

KENNETH GUINN, Supt. of Schools,
Clark County School District, *et al.*,

Defendants-Appellants.

No. 71-2340

HERBERT E. KELLY, SR., *et al.*,

Plaintiffs-Appellees,

v.

KENNETH GUINN, Supt. of Schools,
Clark County School District, *et al.*,

Defendants-Appellants.

No. 71-2422

HERBERT E. KELLY, SR., *et al.*,

Plaintiffs-Appellants,

v.

KENNETH GUINN, Supt. of Schools,
Clark County School District, *et al.*,

Defendants-Appellants.
[Cross-Appeals]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Supplemental Brief for Plaintiffs

Pursuant to leave granted by the panel at the oral argument in this matter on November 11, 1971, plaintiffs file this Supplemental Brief explaining in detail the use made of the various maps in the record by plaintiffs' counsel at the oral argument. We are also taking the opportunity in this format to provide the Court with the citations to the two cases mentioned by counsel for plaintiffs at oral argument which were not contained in the brief.

I

With respect to a possible theory that black faculty members were assigned to black schools because the district felt black students should be provided with role models whom they could emulate, counsel for plaintiffs mentioned *Dove* v. *Parham*, 282 F.2d 256 (8th Cir. 1960).

Counsel for plaintiffs also mentioned this Court's decision holding segregation imposed by administrative action without the sanction of state law unconstitutional in *Westminster School District of Orange County* v. *Mendez*, 161 F.2d 774 (9th Cir. 1947).

II

The following comments about the maps in the record relate to subjects discussed at the oral argument and are elaborated in detail for the convenience of the Court.

One of the subjects at issue in this case is the construction by the school district in 1965 and 1966 of the black Gilbert and Mackey Elementary Schools. It is instructive in considering this matter to examine the 1964-65 zoning map for the Highland Elementary School found at page 61 of the record, the 1965-66 zoning maps for the Highland and Mackey Elementary Schools found at page 113 of the record, and the 1966-67 map of the zones for Highland,

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Gilbert and Mackey found at page 116 of the record. Enrollment statistics by race for each school are available only for the 1964-65 (record at p. 50) and 1966-67 (record at p. 114) school years. Although the comparison is made more difficult because the 1964-65 zoning maps are photocopies of street maps with individual zones delineated by cross-hatching, while the 1965-66 and 1966-67 maps are schematic, it is apparent from a comparison of the three maps mentioned above that the area presently served by Highland (subsequently renamed Booker), Gilbert and Mackey is essentially the same area served by Highland Elementary alone in 1964-65. During that year the record shows that Highland had an enrollment of 1,014 black students at 46 "other" (white) students. The map at page 61 of the record very clearly shows the northern boundary of the Highland zone to have run along Cheyenne Avenue from the railroad tracks on the east to Simmons Street on the west (the Xerox copy of the map in the record does not show the entire street name, but an arrow pointing to the western boundary of Highland running south from its intersection with Cheyenne can be seen and part of the words Simmons Street are visible). The zone runs south to Smoke Ranch Road (again the entire street name is not visible, but the last e of Smoke and the word Ranch can be made out) over to Luning and south to Lake Mead Boulevard. The zone then takes in the entire area north of Lake Mead Boulevard and east to the railroad tracks except for a small area at the eastern edge which is marked "Valley View Estates." Examination of the record at page 73, showing the zone for Matt Kelly Elementary shows the disposition of that small area north of Lake Mead Boulevard and south of Miller Avenue, west of the railroad tracks and east of Revere.

Comparing the original Highland zone with the maps at pages 113 and 116 of the record, the first striking fact

revealed is that the northern boundary line for Highland, Gilbert or Mackey has consistently been drawn along Cheyenne Avenue. At the same time, Gilbert, Mackey and Highland have remained black schools while Lois Craig, the elementary school serving the area north of Cheyenne, has been predominantly white. In 1964-65 when Lois Craig served a large area north of Cheyenne as well as a small area between Simmons and the Thunderbird Air Field, south to Cartier (record at p. 71), it enrolled 725 white students and 32 black students (record at p. 50). In 1965-66, it served essentially the same area. In 1966-67, it served virtually the same area but lost to C.V.T. Gilbert the small space between Simmons and the Air Field; it actually lost a few black students in the process, enrolling 389 white students and 44 black students. Thus, the comment in the Reply Brief of the school board that Mackey was so located as to provide for future growth north of Cheyenne Avenue (page 6 of Reply Brief) is belied by the school district's practice of drawing a rigid boundary between the black area south of Cheyenne and the predominantly white area north of Cheyenne.

In 1966-67 Lois Craig was considerably below its capacity, enrolling 433 students compared to its 1964-65 enrollment of 757. Yet no black students residing south of Cheyenne Avenue between the railroad tracks and the air field were assigned to Lois Craig nor were white students north of Cheyenne assigned to either Gilbert or Mackey. Instead, whites living north of Cheyenne near the air field, who are obviously much closer to Gilbert or Mackey, travelled all the way east to Lois Craig. In 1966-67 Gilbert enrolled 516 blacks and only 5 whites, Mackey 761 blacks and no whites, and Lois Craig 389 whites and 44 blacks.

Except for the addition of the area between Simmons and the air field to Gilbert, all of the zone changes necessitated by the construction of Gilbert and Mackey took place within

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the original Highland zone which was overwhelmingly black. Not surprisingly, three schools which now served that area, instead of one, became racially identifiable as black schools. There was no extension of the Lois Craig zone south or vice versa. There was no adjustment in the zones for other black schools, Kelly, Carson, Madison and Westside, despite the construction of Gilbert and Mackey to relieve the pressure on Highland.

The effect of closing Washington and Jefferson Elementary Schools was also discussed at the oral argument. We refer the Court in this connection to the 1964-65 zoning maps for Washington (record at p. 92), Jefferson (record at p. 62), Kit Carson (record at p. 68), and McCall (record at p. 88) Schools as well as to the 1966-67 zoning maps (record at p. 116).

In 1964-65, the Kit Carson zone extended from Lake Mead Boulevard to West Owens between the railroad tracks and Holmes Street (record at p. 68) just as it did in 1966-67 (record at p. 116). In 1964-65 Carson enrolled 719 blacks and 14 whites. The McCall School in 1964-65 served an area south of Evans and Cartier between the railroad tracks on the west and the Las Vegas Boulevard on the east but extending only south to Lake Mead Boulevard (record at p. 80). At that time it enrolled 514 whites and no black students. The area between the railroad tracks and Las Vegas Boulevard south of Lake Mead Boulevard was served in 1964-65 by the Washington School (record at p. 92). It enrolled 185 whites and 9 blacks (record at p. 50). The Jefferson Elementary School had a zone just east of Washington and east of Las Vegas Boulevard (record at p. 62) enrolling 196 whites and no blacks (record at p. 50).

After Washington and Jefferson were closed at the same time as new capacity was made available west of the railroad tracks by the construction of the Gilbert and Mackey

Schools, the zone for Kit Carson or Westside, black schools, was not extended to the east across the railroad tracks to integrate either facility. Instead the McCall zone was extended southward below Lake Mead Boulevard (record at p. 116). In 1966-67 McCall enrolled 512 whites and 42 blacks. Had Washington or Jefferson been retained, the Superintendent testified that in 1968 they would have been about 50% black (October, 1968 transcript, p. 201). It is further clear that opportunities for desegregation at Carson and Westside presented by the closing of Washington and Jefferson were not taken.

The maps also assisted in visualizing one of the examples mentioned in oral argument of the way in which white students have been assigned to white schools even if closer to black schools. The 1964-65 map for Highland Elementary (record at p. 61) shows an area south of Smoke Ranch Road, north of Lake Mead Boulevard and west of Luning which is much closer to the Highland School than most of the northeast portion of the zone. However, it is excluded from the zone. The zoning map for the McWilliams Elementary School for the same year (record at p. 67) shows that the area referred to next to the Highland School has been obviously gerrymandered into McWilliams; in 1964-65, McWilliams enrolled 989 white students and no blacks while Highland enrolled 1,014 blacks and 46 whites (record at p. 50). The 1966-67 map (record at p. 116) shows the same area cut out of the Gilbert zone and the map on page 119 of the record shows that that area is zoned to McWilliams, a school located so far west that it cannot be shown on the map. Obviously students from that area are bused at the school district's expense to McWilliams, which in 1966-67 enrolled 843 whites and 19 blacks while Gilbert enrolled 516 whites and 5 blacks (record at p. 114). Dr. Lawrence confirmed that this white area has historically been zoned away from the closest black school, either Highland or

Gilbert, and transported to McWilliams or Ronzone (June, 1971 transcript, p. 301-02).

Plaintiffs greatly appreciate the opportunity to elucidate for the Court what the inspection of the maps in the record shows. We regret that because of the short time available to work with the maps we were unable to include these detailed verbal descriptions in our main brief.